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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' JOINT REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1967

No. 1420

JOHN FRANZESE, also known as "Sonny," WILLIAM DAVID CRABBE, also known as "Red," JOHN MATERA, also known as "Johnny Irish," NICHOLAS POTERE and JOSEPH M. FLORIO, also known as "Whitey,"

Petitioners,

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UNITED STATES OF AMERICA,

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PETITIONERS' JOINT REPLY BRIEF

I.

In its brief in opposition, the United States has revealed for the first time that an electronic device was installed by trespass in the home of the Petitioner Franzese and that conversations of the Petitioner Franzese were seized over a period of at least three months. The petition for a writ of certiorari should be granted, the judgment of the Court of Appeals should be vacated, and the case should be remanded to the District Court for a hearing to determine the nature and relevance to the convictions herein of any conversations seized through the admittedly unlawful electronic surveillance of the Petitioner Franzese's home.

The briefs on appeal of the Petitioners in the Court of Appeals were filed in December, 1967. The Petitioners there requested that, prior to deciding the appeal, the Court of Appeals order the Department of Justice to conduct a plenary review of its files to ascertain whether there had

been any electronic eavesdropping relating to any of the Petitioners. In support of this request, the Petitioners cited, *inter alia,* the existence of one conceded wiretap and the characterization by the government that the case involved "organized crime."

In its reply brief in the Court of Appeals, the government termed the above requests of the Petitioners as "bizarre" and a "fishing expedition."

At the oral argument in the Court of Appeals, on February 23, 1968, the Assistant United States Attorney admitted that his office had not yet informed the Justice Department of the Petitioners' request for plenary review and disclosure, but, at the direction of the appellate panel, he undertook to do so immediately and to advise the Court as to his findings. In the Court of Appeals opinion, affirming the convictions of the Petitioners, there is no indication as to whether the United States Attorney or the Justice Department did, in fact, ever communicate this information to the Court of Appeals. Counsel for the Petitioners have no knowledge as to whether such a communication was made.

Now in a casual postcript to his Brief in Opposition (pp. 18-19), submitted on the eve of this Court's present term, the Solicitor General belatedly admits that there was indeed the most blatant trespassory eavesdropping in the home of the Petitioner Franzese for a period of at least three months.

Among the critical facts which the Government's Brief in Opposition does not reveal, are when the "bug" was installed in Franzese's home and when, if ever, it was deactivated and/or removed. Additionally, we have the Solicitor General's bare statement that it is his under-

standing that this eavesdropping had no relevance to the prosecution herein. It is improbable in the extreme that the Solicitor General's knowledge of the case is such that he can trace the tangled web of investigation and authoritatively state that the seized conversations bore no fruit which found its way into the present case. This Court has often repeated the admonition that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392. It is also to be noted, with no aspersion intended upon the Solicitor General, that the Petitioners had the representation of an Assistant United States Attorney in the District Court and of the United States Attorney in his Brief in the Court of Appeals that there had been *no* eavesdropping.

The Solicitor General's explanation for the Government's failure to disclose the eavesdropping earlier is thoroughly not in accord with the facts. He submits that no disclosure was required until the decision of this Court in *Kolod* v. *United States,* 390 U.S. 136, decided January 29, 1968. He omits, however, the fact that the opinion in *Kolod* was handed up to the Court of Appeals on the oral argument of this case. That oral argument took place approximately *one month after Kolod* was decided by this Court. Likewise, he does not mention that the appeal remained pending before the Court of Appeals for an additional month after the oral argument. He makes no attempt to explain why it is only now, almost five months after the decision in *Kolod,* that this revelation is made. Must a defendant in a criminal case go all the way to the Supreme Court of the United States, and only there be told of such surveillance?

As a matter of governmental integrity, particularly in light of the fact that information concerning electronic surveillance had been sought by the defense at the time of the trial, the government should have come forward with this information as soon as its legal pertinence, by virtue of *Kolod*, was clear. There is simply *no* justifiable reason for the failure of the Department of Justice to make this disclosure before the present time.

The Solicitor General would have this Court brush aside the failure to disclose—a question which was a part of the Petition for Certiorari itself, pp. 4, 30-32. Indeed, the Government would have this Court deny the Petition for Certiorari immediately, alleging that such a denial would not be prejudicial to the Petitioners. To the contrary, the prejudice of such a procedure is clear: If this Court permits the judgments of conviction to stand, several of the Petitioners, now on bail, would be remanded before the required exploration of the now questionable Constitutional basis upon which their convictions rest.

The Solicitor General claims that the Petition for Certiorari should be denied immediately "in order not to delay the final disposition of this case . . ." (Brief in Opposition, at page 19). It is not apparent to the Petitioners how this case can finally be disposed of until the disclosure proceeding has been held in the District Court. If the Government were truly concerned with an early final disposition, it could have accomplished that end by initiating a review procedure in December, 1967 when the Petitioners first requested disclosure; certainly, disclosure could have been made some time after oral argument, when the United States Attorney

finally undertook to inform the Department of Justice,* rather than at the eleventh hour. Any delay there may now be, will have been caused by the Government's own dereliction. It is no service to Justice nor to this Court to ask this Court to rule upon the issues raised in a petition for certiorari in a piecemeal manner before the proceedings below become final. Until the termination of the disclosure proceedings, this Court will have no assurance that the convictions, which the Solicitor General now asks be left standing, are free from unconstitutional taint. Moreover, to deny the petition would be to ignore—indeed reward—the Government's clear breach of its duty to disclose earlier the eavesdropping only now revealed. The effect of that breach has already been to obtain an unwarranted affirmance of the Petitioners' convictions by the Court of Appeals. In these circumstances, and in light of the serious import of the facts revealed, this Court should not be asked to give its imprimatur to convictions whose very basis may be unconstitutional.

The Petitioners believe that the questions here raised have broad impact, and that this Court should consider (a) whether the Court of Appeals should have affirmed the convictions absent the prior eavesdropping disclosure which had been requested by the Petitioners, and (b) whether the Department of Justice has implemented an adequate system for disclosing eavesdropping at an appropriate stage of the proceedings, as evidenced by the course it has taken in this case.

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* Petitioners ask this Court to note the failure of the United States Attorney to inform the Justice Department of the direct request made of it by the Petitioners until so directed by the Court of Appeals, while filing a brief dismissing the request out of hand—purportedly as agent for the Justice Department.

Counsel for the Petitioners were not served with, nor have they yet had an opportunity to obtain the Brief for the Government in *Scandifia* v. *United States,* No. 1290, this Term, currently pending. In effect, the Solicitor General incorporates by reference in his present brief, at page 19, the arguments which were contained in his brief in *Scandifia.* We have no way of knowing what those arguments are! We urge that a final disposition by this Court of the issues raised by our joint Petition for Certiorari and by this Answering Brief await the service upon the Petitioners of the Government's brief in *Scandifia* and we be given an opportunity to reply to any additional arguments contained therein.

For the reasons stated, Petitioners request that the Writ of Certiorari be granted, that the judgment of the Court of Appeals be vacated, and the case remanded to the District Court for a hearing, findings, and conclusions of the nature and relevance to these convictions of any conversations that may be shown to have been overheard through the admittedly unlawful electronic surveillance of Petitioner Franzese's home. This was the procedure adopted by this Court in *Kolod* v. *United States,* 390 U.S. 136. In the alternative, the Petitioners request that this Court retain supervisory jurisdiction without denying the petition, pending the outcome of the disclosure proceedings in the District Court.

II.

Concerning payments made by the Petitioner Potere to the attorneys for Parks and Cordero.

In our Petition for Certiorari, at pages 28-30, we urged that the Government's case at trial was devoid of proof of the Petitioners' alleged involvement in the bank robbery conspiracy, aside from the testimony of the Government's four bank robber-witnesses whose testimony had been bargained for by the Government.

In its Brief in Opposition, at page 6, the Government states:

> "The lawyers who represented Parks and Cordero following their arrest testified that they received approximately $1,100 from Potere for Parks and $960 from Potere and Cordero, to be used primarily for attorney's fees and bail."

The above statement is utterly misleading, and wrongly conveys the impression that the attorneys' testimony corroborated the allegation that, *as part of the conspiracy,* Potere "put up" the funds in question for the purposes alleged. The Petitioners are impelled to correct that impression.

Parks and Cordero were two of the Government's bank robber-witnesses; Potere is one of the Petitioners herein. The attorneys in question were witnesses for the Government, and they did not testify that Potere "put up" the money, but rather that their clients had instructed them to try and collect a loan which had been made to Potere, that they (the attorneys) had communicated this fact to Potere, that Potere acknowledged the debt and that Potere eventually paid the debt to them. (2648-2704; 2785-2797).

CONCLUSION

For all of the foregoing reasons, and for those reasons contained in the Petition for Certiorari, it is submitted that the Writ of Certiorari should be granted, and the judgment of the Court of Appeals should be remanded to the District Court for a hearing, findings, and conclusions on the nature and relevance to these convictions of any conversations that may be shown to have been overheard through the admittedly unlawful electronic surveillance of Petitioner Franzese's home, or, in the alternative, that this Court should retain supervisory jurisdiction, without denying the Petition, pending the outcome of the disclosure proceeding in the District Court. If this Court adopts the proposal, urged by the Government and opposed by the Petitioner, that the issues presented by the Petition for Certiorari be now disposed of without reference to the newly revealed electronic surveillance, then the Petition for Certiorari should be granted as to those issues.

Respectfully submitted,

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